

## FOLEY EXECUTIVE BRIEFING SERIES



### From Innovation to Regulation: Sustainability in Business

Bruce A. Keyes, Foley & Lardner LLP

The Capital Hilton

April 24, 2008



©2007 Foley & Lardner LLP • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not clients, but may be representative of clients • 321 N. Clark Street, Suite 2800, Chicago, IL 60610 • 312.832.6500 • 07.3431



## FOLEY EXECUTIVE BRIEFING SERIES

### Supply Chain Sustainable Best Practices

- Will emerge through:
  - Marketplace mandates (purchasers demand it, and/or Europe does it),
  - Regulation and executive order (or state/local government equivalents)





## Supply Chain Sustainable Best Practices

- EPA's EPEAT certification of green products;
- E- Waste mandates;
- Market incentives to reduce packaging and promote green materials for shipping/packaging;
- Supplier certifications of compliance with sustainability objectives or national/international standards



## Emerging Supply Chain Issues

- Supply chain certifications of green compliance by subcontractor or sub-vendors;
- False claims of “green”/greenwashing;
- Enforcing green covenants;
- Laying claim to carbon (allocating theoretical carbon credits).



## Trends in E-waste

- What is E-waste?
  - Waste consisting of any unwanted electrical or electronic appliance
- What may it include?
  - Televisions
  - Common office equipment (computers and various peripherals)
  - Cell Phones, PDAs
  - Other industry-specific technology (Medical)
- Lead, Mercury, Cadmium, Beryllium, PCBs, PVC, Brominated flame retardants



## How much of it is there?

- 315-600 million computers
- 130 million cellular phones
- USEPA says 163,420 TVs and computers will become obsolete every day in '06





## How much will there be...

- TVs now have only ten year useful life
- Computers – 3 years
- Analog TVs about to become obsolete



## Liability

- CERCLA (superfund)
  - Generator liability
- RCRA
  - Provides “cradle to grave” hazardous waste management authority;
  - Includes generation, treatment, storage and disposal of hazardous waste;
  - Residential exemptions
  - Does not apply to products in use
    - But businesses storing old computers >90 days are likely in violation of RCRA.
- Civil
- State Regulations





## Liability Issues with regard to the sale of electronics

- Generally, selling or donating a useful product releases the seller from liability.
  - However, if usable products are sold with unusable materials this could be considered arranging for disposal.
  - If the buyer improperly manages the unusable material there is potential for the seller to be liable.
  - Proper and documented due diligence is the key to preventing liability.
- Data liability and concerns. e.g., HIPAA



## What's being done around the world?

- Europe: Waste Electrical and Electronic Equipment (WEEE) directive
  - Took effect in 2005
  - Participating countries develop own methods for compliance
  - Responsibility is shared
    - Manufacturers operate a take-back program
    - Retailers accept old equipment for pick-up
    - Consumers expected to bring old equipment to retail or other drop-off locations
  - 0.01% and 0.1% by weight limits going into effect for lead, cadmium, mercury, hexavalent chromium and two flame retardants in
- Japan: Similar legislation enacted.



## The Two Competing Models

- Advance Recovery Fee (ARF)
  - An additional charge, usually \$10 or less, is imposed on the consumer at the time a piece of electronic equipment is purchased.
- Producer Responsibility (PR)
  - Manufacturers become responsible for the complete life-cycle of the products they make, paying a fee per piece of equipment either sold or returned for recycling



## Advance Recovery Fee (ARF)

- California's legislation adopted this model
- Favored by television manufacturers
  - Low-margin competition from abroad makes it difficult for TV makers to absorb any additional costs or raise their prices
  - IBM also supports ARF
- Other computer manufacturers, as well as retailers, oppose the ARF



## More on Producer Responsibility

- Maine and Maryland have adopted various models of PR
- USEPA Region V draft legislation is PR-based; so are Washington's and New Hampshire's
- Hewlett-Packard, Dell, and other computer manufacturers are supportive of legislation modeled on the PR concept
- Retailers also are generally supportive
- Television manufacturers oppose it



## Congressional E-Waste Recycling Plan

- Informal, bipartisan e-waste working group
- New e-waste subtitle of the Resource Conservation & Recovery Act (RCRA)
- Ban land disposal of e-waste containing reusable commodities or materials
- Regulate e-waste as a new category of wastes



## Congressional E-Waste Recycling Plan

- Require EPA to set minimum standards for new state programs
- Require increased notifications and consent from receiving countries for e-waste exports
- EPA would be responsible for registering manufacturers, recyclers and retailers
- Setting scalable registration fees to fund regulatory programs



- Developing performance requirements for a mandatory registration program for electronics producers and recyclers
- Allocating a certain portion of registration fees to state and local governments





## Tackling E-waste

- Dramatic increase in states regulating e-waste handling and disposal
- Ways e-waste has been addressed:
  - Comprehensive recycling programs
  - Ban on landfill disposal of e-waste
  - Voluntary/pilot recycling programs
- Bans vary from state to state
  - Broad (“electronic devices”)
  - Narrow (“cathode ray tubes”)



## Business Perspective

- Look for “green” electronics
- Find ways to reuse electronics
  - In house
  - Distributing to a new user
- Recycle when reuse isn’t possible
  - Ensuring that products are recycled
  - Finding a reliable recycler
- Disposal as a last resort
- **Don’t accumulate!!**
- **Be thoughtful about contracting!!**

